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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

RICKY RAY RECTOR,

Petitioner

V.

WINSTON BRYANT, ATTORNEY GENERAL, STATE OF ARKANSAS and A. L. LOCKHART, DIRECTOR OF ARKANSAS DEPARTMENT OF CORRECTIONS,

Respondents

On Appeal from the United States Court of Appeals for the Eighth Circuit

# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the proper standard was applied to the facts to determine whether Mr. Rector has the requisite mental capacity to be put to death without violating his eighth amendment rights.

2. Whether Mr. Rector's sixth amendment rights were violated because he was tried when he was not competent to consult with his attorney.



## PARTIES TO THE PROCEEDING

Steve Clark, Attorney General for the State of Arkansas, was listed as an appellee in the appeal before the United States Court of Appeals for the Eighth Circuit (90-1204), whose judgment is sought to be reviewed by this Court. In the elections of November, 1990 in the State of Arkansas, Winston Bryant was elected Attorney General for the State of Arkansas and is therefore substituted as a party in place of Steve Clark for purposes of this Petition for Writ of Certiorari.

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## OPINION BELOW

The opinion of the Court of Appeals below (Appendix A, infra, pp. A-1 to A-4) is reported in 923 F.2d 570 (8th Cir. 1991). The opinion of the District Court below (Appendix B, infra, pp. B-1 to B-10) is reported in 727 F. Supp. 1285 (E.D. Ark. 1990).

## JURISDICTION

The judgment of the Court below (Appendix A, infra, pp. A-1 to A-4) was entered January 2, 1991. Rehearing and rehearing en banc was denied on February 13, 1991 (Appendix C, infra, p. C-1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS, STATUTES, STANDARDS, PENDING LEGISLATION AND CONGRESSIONAL RECORD INVOLVED

1. The Eighth Amendment, United States Constitution, provides:

> Bail-Punishment. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

2. The Sixth Amendment, United States Constitution, provides:

> Rights of the Accused. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for

obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

3. The statute under which Petitioner sought post-conviction relief was 28 U.S.C. § 2254 (Appendix D, infra, pp. D-1 to D-3).

4. The standard under which the Petitioner would be found incompetent to be put to death under the eighth amendment is American Bar Association Criminal Justice Mental Health Standard 7-5.6(b), which provides:

> Currently incompetent condemned convicts; stay of execution
>
> (a) convicts who have been sentenced to death should not be executed if they are currently mentally incompetent. If it is determined that a condemned convict is currently mentally incompetent, execution should be stayed.
>
> (b) a convict is incompetent to be executed if, as a result of mental illness or mental retardation, the convict cannot understand the nature of the pending proceedings, what he or she was tried for, the reason for the punishment, or the nature of the punishment. A convict is also incompetent, if as a result of mental illness or mental retardation, the convict lacks sufficient capacity to recognize or understand any fact which might exist which would make the punishment unjust or unlawful, or lacks the ability to convey such information to counsel or to the Court.

5. Pending legislation in the United States Senate which proposes a standard for implementation of a sentence of death which is conceptionally identical with the American Bar Association Criminal Justice Mental Health Standards 7-5.6(b) is S.618, 102d Cong. 1st Sess. § 3596 (1991) which provides in part:



> Section 3596. Implementation of a Sentence of Death . . .
>
> (c) MENTAL CAPACITY. - A sentence of death shall not be carried out upon a person who is mentally retarded. A sentence of death shall not be carried out upon a person who, as a result of mental disability -
>
> (1) cannot understand the nature of the pending proceedings, what such person was tried for, the reason for the punishment, or the nature of the punishment; or
>
> (2) lacks the capacity to recognize or understand facts which would make the punishment unjust or unlawful, or lacks the ability to convey such information to counsel or to the court.

(Appendix E, infra., pp. E-1 to E-4).

6. S.1970, 101st Cong. 2nd Session, 136 Cong. Rec. S10184, S10189 (daily edition July 20, 1990) is legislation which was passed by the United States Senate on July 11, 1990, but which was never enacted into law. This legislation incorporated a standard for implementation of a sentence of death identical to that contained in S.618, 102d Cong. 1st Sess. § 3596. (Appendix F, infra., pp. F-1 to F-2).

## STATEMENT OF THE CASE

A. Course of Proceedings of Section 2254 Case Now Before this Court. Mr. Rector filed a second amended petition for writ of habeas corpus in the United States District Court for the Eastern District of Arkansas pursuant to 28 U.S.C. § 2254 seeking a permanent stay of his execution based on his current incompetence and a reversal of his conviction based on his

incompetency to stand trial. Following an evidentiary hearing, the district court denied relief.

Mr. Rector appealed the district court decision to the United States Court of Appeals for the Eighth Circuit. The circuit court affirmed the district court decision in its written opinion dated January 2, 1991 and denied Petitioner's Motion for Rehearing and Rehearing En Banc in its order dated February 13, 1991. Jurisdiction for that appeal was based on 28 U.S.C. § 2253. The previously ordered stay of Mr. Rector's execution remains in effect by order of the district court dated June 20, 1984.

B. Jurisdiction Below.

Petitioner sought a writ of habeas corpus pursuant to 28 U.S.C. § 2254 and appealed the denial of that petition pursuant to 28 U.S.C. § 2253.

C. Relevant Facts of Case. Mr. Rector was sentenced to death for capital murder on November 11, 1982 in the Circuit Court of Faulkner County, Arkansas. Before his arrest on the capital murder charges, Mr. Rector shot himself in the forehead. The self-inflicted wound to Mr. Rector resulted in a frontal lobotomy and, as a consequence, severely diminished his mental capacity.

Mr. Rector was charged and tried for capital murder for the alleged killing of Officer Bob Martin, for which Mr. Rector received the death penalty. Prior to the trial, the trial court



held a hearing on Mr. Rector's competency to stand trial and found him competent.

An appeal was made on Mr. Rector's capital murder conviction to the Supreme Court of Arkansas. That court affirmed the conviction and held that the ruling on competency was not clearly erroneous. *Rector v. State*, 280 Ark. 385, 659 S.W.2d 168 (1983). This court denied certiorari. *Rector v. Arkansas*, 466 U.S. 988 (1984).

A petition for writ of habeas corpus was filed on behalf of Mr. Rector and was subsequently amended twice. The petition for writ of habeas corpus sought and the district court granted a mental examination of Mr. Rector at the United States Medical Center for Federal Prisoners in Springfield, Missouri. During the summer of 1989 Mr. Rector was evaluated at that facility, and a report on his condition was submitted to the district court.

The report reflects that Mr. Rector's mental condition is stable and probably has been since one year to eighteen months after his injury in 1981. Furthermore, it is the opinion of the reporting doctor that if Mr. Rector had been tried at the time of the examination, he would not have been competent to stand trial because of his inability to meaningfully interact with his counsel. In his current condition, Mr. Rector could not meaningfully participate in an analysis of mitigating and aggravating circumstances.

With respect to the report's conclusions on whether Mr. Rector has the requisite mental competency to be put to

death, it was found that Mr. Rector appreciates he is on death row, he knows of his sentence of execution and understands his crime. However, he would not have a factual understanding of the proceedings and does not have the mental capability to interact with or have a relationship with a defense attorney. The report, therefore, concluded that Mr. Rector did not have the mental competence to be put to death under the ABA Criminal Justice Mental Health Standard 7-5.6(b).

Dr. Douglas A. Brown, a clinical psychologist, testified at the district court evidentiary hearing. Dr. Brown had examined Mr. Rector in 1981 and in 1982. From his evaluations of Mr. Rector, he formulated an opinion that, at the time of his trial, Mr. Rector was not capable of assisting in a meaningful way in his own defense or cooperating with his attorneys. Dr. Brown testified that he was familiar with the injury to Mr. Rector and that it was the type of injury he would anticipate would improve for 12 to 18 months from the time of the accident. After that period Mr. Rector's mental condition should have become stable; in no event would it have degenerated. Dr. Brown was provided with and reviewed the report and the deposition transcript of the doctor from the United States Medical Center for Federal Prisoners. From his review of this information, Dr. Brown formed the opinion that Mr. Rector's mental condition in the summer of 1989 was the same or improved since 1982.

Dan Stripling was Mr. Rector's attorney at the capital murder trial. Mr. Stripling testified that when he first met



with Mr. Rector, Mr. Rector's mental competency appeared greater than Mr. Stripling had been led to believe. Mr. Rector was cooperative and answered Mr. Striplings questions directly. After the second or third interview Mr. Stripling conducted with Mr. Rector, he found that they were having the same conversation over and over. Mr. Rector was no help in explaining specific events. Mr. Rector would always return to the same points and if questioned intently, he would go to another subject. Mr. Rector wanted to cooperate, however, he could not. Based on these observations, Mr. Stripling knew that Mr. Rector's involvement in the case would be minimal. Mr. Stripling described his interaction with Mr. Rector during the preparation of the case as merely courtesy calls on his client. Attempting to get any further information from Mr. Rector was futile. Likewise, Mr. Stripling did not and could not consult with Mr. Rector during the course of the capital murder trial because he had determined it would be futile. Mr. Stripling had tried to explain mitigating and aggravating circumstances to Mr. Rector, however, by the time of the trial he had given up on getting any meaningful input from Mr. Rector. Mr. Stripling made crucial decisions in the trial without consulting with Mr. Rector. These were decisions which Mr. Stripling would normally have discussed with a client, if the client had had the ability to assist in making the decisions.

In its decision, the district court relied mainly on the competency hearing and trial record in finding Mr. Rector's sixth

amendment rights to counsel had not been violated in spite of Mr. Rector's diminished mental capacity. On the issue of requisite mental capacity to be executed, the district court accepted the findings of the report from the United States Medical Center for Federal Prisoners in Springfield, Missouri. Based on those findings, the court found Mr. Rector competent to be put to death by applying the following standard: whether the condemned's mental illness prevents him from comprehending the reasons for the penalty or its implication. *Rector v. Lockhart*, 727 F. Supp. 1285 (E.D. Ark. 1990).

Likewise, the circuit court in affirming the district court stated that the "Eighth Amendment prevents the execution of 'one whose mental illness prevents him from comprehending the reasons for the penalty or its implications.'" *Ford v. Wainwright*, 477 U.S. 399, 417, 106 S. Ct. 2595, 2605, 91 L.Ed. 2d 335 (1986). Further, the circuit court found no basis to question the state court findings that Mr. Rector was competent to stand trial, therefore, those findings were presumed correct. *Rector v. Clark*, 923 F.2d 570 (8th Cir. 1991).

ARGUMENT

A. Why should a writ of certiorari be granted for the first question presented, which is whether the proper standard was applied to the facts to determine whether Mr. Rector has requisite mental capacity to be put to death without violating his eighth amendment rights?



In *Ford v. Wainwright*, 477 U.S. 399, 106 S. Ct. 2595, 91 L.Ed 2d 335 (1986), this Court held that the eighth amendment prohibits a state from carrying out a sentence of death upon a prisoner who is insane. This Court, however, did not state a specific test or standard to determine when a prisoner is mentally competent to be put to death. Instead, this Court recognized that the standard was an evolving standard left open for further change and review. The decision below was premised on a strict reading of *Ford* without considering the evolving standards.

This Court's opinion in *Ford* included an extensive discussion of the various bases for its holding. The Court did not rely exclusively on one particular reason for its holding. The Court cited *Blackstone's Commentaries* as one source for its holding. Id. at 406, 106 S.Ct. at 2600, 91 L.Ed 2d at 344. The reasoning in the *Blackstone's Commentaries* was that if the condemned had not been mentally incompetent, he might have alleged something which would stay the execution. Id. at 407, 106 S.Ct. at 2600, 91 L.Ed 2d at 345. Turning again to common law rationale, the Court noted that one explanation for the bar of the execution of an insane person was that it "simply offends humanity." Id. at 407, 106 S.Ct. at 2600, 91 L.Ed 2d at 345. Another basis was that there is no contribution to the deterrence value of capital punishment. Id. at 407, 106 S.Ct. at 2600, 91 L.Ed 2d at 345. "Religious underpinnings" were also cited as the basis for the eighth amendment right prohibiting the execution of

the insane. Id. at 407, 106 S.Ct. at 2600, 91 L.Ed 2d at 345. The retribution theory is also a basis for barring execution of the insane in that the theory behind retribution is that the criminal act is offset by "a punishment of an equivalent 'moral quality'" and the insane person has a "lesser value" than that of the crime for which he is punished. Id. at 408, 106 S.Ct. at 2601, 91 L.Ed 2d at 345.

The Court concluded that "the Eighth Amendment prohibits a state from carrying out a sentence of death upon a prisoner who is insane. Whether its aim be to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction finds enforcement in the Eighth Amendment." Id. at 409-410, 106 S.Ct. at 2602, 91 L.Ed 2d at 346; *requisite.*, *Penry* v. *Lynaugh*, 492 U.S. 302, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989). (Court refused to rule that executing mentally retarded people is categorically prohibited by the eighth amendment.)

Having found that the eighth amendment protects the "insane" from execution, the Court stops and does not define the category of defendant or promulgate a test for identifying the "insane". This is consistent with the Court's choice to not select one limiting rationale for its holding. The Court has in essence left open a window for the States and Circuits to define "insane" in a manner that is consistent with the reasons given for the holding that it is unconstitutional to execute the insane.



Alvin Bernard Ford, who was the condemned prisoner in *Ford*, was found to suffer from severe delusions, paranoia and major mental disorders. From *Ford* we know that these severe disorders rise to the level that prevents states from taking the prisoner's life.

The concurring opinion of Justice Powell proposes that the test for insanity be "that the Eighth Amendment forbids the execution only for those who are unaware of the punishment they are about to suffer and why they are to suffer it". Id. at 422, 106 S.Ct. at 2608, 91 L.Ed 2d at 354. This test is based on the reasoning that the retributive value of the death penalty depends on the defendant's awareness of the penalty's existence and purpose. Justice Powell has therefore selected one rationale as a basis for the eighth amendment right and fashioned the test for insanity around that rationale. By selecting the retributive value reason, Powell has discounted all other reasons in formulating his test. The specific and extensive discussion of the other reasons in the plurality opinion indicates that the Court finds the other reasons supporting the eighth amendment right are also of merit and are to be considered in the formulation of a test for "insane".

In order to determine whether an individual has the requisite competency to be put to death by the State, a court must fashion a definition of "insane" which is consistent with the reasoning of this Court in *Ford v. Wainwright*. Within the discussion in *Ford* is a strong caveat that any test established

by *Ford* for incompetency is not a fixed or static test. The test must evolve with society. The Court in *Ford* stated:

> . . . the Eighth Amendment prescriptions are not limited to those practices condemned by the common law in 1986 . . . not bound by the sparing humanitarian concessions of the forbearers, the amendment also recognizes the 'evolving standards of decency that mark the progress of a maturing society' . . . in addition to considering the barbarous methods generally outlawed in the eighteenth century, therefore, this court takes into account objective evidence of contemporary values before determining whether a particular punishment comports with the fundamental human dignity that the amendment protects . . . .

*Ford, supra*, 477 U.S. at 406. Therefore, *Ford* instructs the courts to look to objective evidence of evolving standards to fashion a test for incompetency. Relevant sources for the evolution and clarification of this test by the Court can be found in pending federal legislation and the American Bar Association Criminal Justice Mental Health Standards.

Under the American Bar Association Criminal Justice Mental Health Standards 7-5.6(b), the ABA has promulgated the following recommended standard for the "currently incompetent condemned convicts; stay of execution"

> (a) convicts who have been sentenced to death should not be executed if they are currently mentally incompetent. If it is determined that a condemned convict is currently mentally incompetent, execution should be stayed.
>
> (b) a convict is incompetent to be executed if, as a result of mental illness or mental retardation, the convict cannot understand the nature of the pending proceedings, what he or she was tried for, the reason for the punishment, or the nature of the punishment. *A convict is also incompetent, if as a result of mental illness or mental retardation, the convict lacks sufficient capacity to recognize or understand any fact which might exist which would make the punishment*



> *unjust or unlawful, or lacks the ability to convey such information to counsel or to the Court.* (emphasis added.)

The adoption of this standard by the ABA is an expression of that association's collective standard of decency concerning one's eighth amendment rights.

Further, in July of 1990, the United States Senate passed Bill No. 1970 which included language which was conceptually identical to the ABA standards. Unfortunately, all sections of the bill dealing with death penalty and habeas corpus were deleted prior to submission of the final anti-crime bill to the President for signature. Notwithstanding the ultimate deletion, the fact remains that the United States Senate, after careful deliberation, has voted in favor of language reflecting concepts of the ABA Standards.

Similarly, now pending before the United States Senate is Senate Bill 618, which has language identical to Senate Bill No. 1970 from the 1990 session. Senate Bill 618 provides in part:

> Section 3596. Implementation of the sentence of death . . . (C) MENTAL CAPACITY. - A sentence of death shall not be carried out upon a person who is mentally retarded. A sentence of death shall not be carried out upon a person who, as a result of mental disability -
>
> (1) cannot understand the nature of the pending proceedings, what such person was tried for, the reason for the punishment, or the nature of the punishment; or
>
> (2) lacks the capacity to recognize or understand facts which would make the punishment unjust or unlawful, or lacks the ability to convey such information to counsel or to the court.

S. 618, 102d Cong. 1st Sess. § 3596 (1991).

The resurection of this language in the 1991 Senate bill further confirms that this is a standard which society is choosing to endorse.

In light of the reasoning of this Court in *Ford v. Wainwright*, and the evidence of the evolving standards of decency, this Court must grant certiorari to reevaluate and clarify the level of mental competence which must be displayed by the prisoner so that his execution will not be cruel and unusual punishment prohibited by the eighth amendment. Considering the various bases expressed in the *Ford v. Wainwright* case and the pending legislation, the ABA Criminal Justice Mental Health standard 7-5.6(b) is the most appropriate standard to apply. In essence, this standard consists of two tests which must be met. The first is that the convict must understand the nature of the pending proceedings, the crime for which he was tried, the reason for the punishment or the nature of the punishment. The second test is that the convict must have sufficient mental capacity to recognize or understand any fact which might exist which would make the punishment unjust or unlawful and must have the ability to convey this information to his counsel or to the court. The first test is basically the test set forth in Powell's concurring opinion in *Ford v. Wainwright*. The second portion of the test is essentially the *Dusky* test for competency to stand trial. *Dusky v. U.S.*, 362 U.S. 402, 80 S. Ct. 758, 4 L. Ed 2d 824 (1960)



In *Ford v. Wainwright*, the Court stated that its rationale for the eighth amendment bar to execution of the insane is in part based on whether the prisoner had the mental capacity to allege some fact which would stay his execution. *Ford* at 407, 106 S.Ct. at 2600, 91 L.Ed 2d at 345. This is essentially the same test as that for the effective assistance of counsel. This rationale would support the second portion of the ABA standard for competency.

The second rationale in the *Ford v. Wainwright* decision was that the execution of the insane simply offends humanity. Again, the second portion of the ABA standard is supported by this rationale. Society and humanity are offended by the killing of defenseless persons. If it is shown that the prisoner lacks the sufficient capacity to recognize or understand any fact which might exist which would make punishment unjust or unlawful and that he lacks the ability to convey such information to counsel, then in essence the prisoner is defenseless. If the prisoner does not have this basic capacity, it is offensive to humanity to put him to death and; therefore, the execution should be barred under the eighth amendment prohibition for cruel and unusual punishment.

The first test under the ABA standards, whether the convict understands the nature of the proceedings and the reason for punishment, finds support in the remaining bases expressed in *Ford v. Wainwright*. Where there is an understanding of the reason for the punishment and the nature of the punishment, the

deterrence value of capital punishment is valid. Additionally, where the convict has the requisite understandings under the first portion of the ABA standards test, there can be measurable culpability which is required to support the retribution theory for capital punishment. Only a test which includes both an understanding prong and an ability to assist prong is consistent with *Ford v. Wainwright*.

Therefore, this Court should grant certiorari to clarify the evolution of the standards of *Ford* and adopt the ABA standard as its test for the constitutionality of execution of a mentally deficient person.

B. Why should a writ of certiorari be granted for the second question presented, which is whether Mr. Rector's sixth amendment rights were violated because he was tried when he was not competent to consult with his attorney?

Although it is recognized by the Petitioner that this Court does not grant certiorari merely to review evidence, this case involves the application of clear evidence, not available at trial, to the Petitioner's sixth amendment right to counsel. The facts developed subsequent to trial clearly show that there was no meaningful communication between Mr. Rector and his attorney. This conclusion is supported by the findings of the United States Medical Center for Federal Prisoners and the testimony of medical experts.

On October 7, 1981, the Circuit Court of Faulkner County, Arkansas entered an order concluding that Mr. Rector was competent to stand trial. That conclusion was based upon the



following findings of fact contained in the circuit court's Order:

> That the Defendant understands the nature of the charges now pending against him, the seriousness of the charges, and the consequences of those charges.
>
> That the evidence presented show [sic] the defendant to be emotionious [sic], mildly retarded, encapable [sic] of understanding complex legal proceedings, and to have a loss of memory surrounding the events from which the charges now pending arise.

Subsequently, in a supplemental competency hearing, the circuit court concluded Mr. Rector was competent to stand trial for capital murder, but no additional findings were made.

It is proper for a federal district court to supplement the state court record with an evidentiary hearing on a habeas corpus petition. Where the district court reviews the state court findings, supplemented by an evidentiary hearing, the district court is not bound by the legal conclusions the state court drew from the facts. *Hawkman v. Parratt* 661 F.2d 1161, 1165-1168 (8th Cir. 1981).

On December 7, 1989, the district court supplemented the state court record with an evidentiary hearing on the habeas corpus petition. Under 28 U.S.C. § 2254(d), the applicant has the burden of showing by convincing evidence that the factual determination made by the state court was erroneous. *Lyle v. Wyrick*, 565 F.2d 529 (8th Cir. 1977); and *Davis v. Wyrick*, 766 F.2d 1197 (8th Cir. 1985).

The Eighth Circuit has stated that competency to stand trial is a factual issue and the state court's findings on that issue

must be presumed correct unless there is a basis for questioning those findings under 28 U.S.C. § 2254(d). *Beans v. Black*, 757 F.2d 933 (8th Cir. 1985).

It is a violation of due process to convict a person while he is legally incompetent. *Pate v. Robinson*, 383 U.S. 375, 378, 86 S. Ct. 836, 838, 15 L. Ed. 2d 815 (1966). The test to determine whether a defendant is competent to stand trial is set forth in *Dusky v. U.S.*, 362 U.S. 402, 80 S. Ct. 758, 4 L. Ed 2d 824 (1960). The court stated

> It is not enough for the district judge to find that the defendant [is] oriented to time and place [has] some recollection of events, but that the test for competency must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him.

In this case, the district court had before it convincing evidence that the state court's finding that Mr. Rector was competent to stand trial was erroneous. By its very nature, the evidence before the district court was unavailable to the state court. Mr. Rector's attorney, Dan Stripling, testified before the district court that Mr. Rector did not have the ability to consult with him at the time of his trial. Dan Stripling testified that he made decisions at trial without consulting Mr. Rector because consultations were futile. He testified that he gave up interviewing Mr. Rector because the process was futile and frustrating and provided him no meaningful communication. Mr. Rector could not understand mitigating and aggravating circumstances or relate to his attorney if any such circumstances



existed. Dan Stripling and the doctor for the United States Medical Center for Federal Prisoners both testified that in interviews Mr. Rector was often not responsive to questions asked even though his demeanor was such that he was attempting to cooperate with the interviewer.

The testimony of Mr. Stripling was supported by medical evidence. The opinion of the doctor for the United States Medical Center for Federal Prisoners was that as of the summer of 1989 Mr. Rector was not competent to stand trial. He was "quite confident" of the opinion and had no reservation with respect to it. This was the opinion of the independent federal evaluation team which was appointed to examine Mr. Rector by the district court.

The psychologist who evaluated Mr. Rector in 1981 and 1982 reviewed the reports and depositions of the doctor for the United States Medical Center for Federal Prisoners and concluded that Mr. Rector's condition had either improved or remained stable since the time of his trial. If Mr. Rector is not competent to stand trial today, but his mental condition is improved or has remained stable since the time of his trial, then at the time of his trial he was not competent. These facts were undisputed at the evidentiary hearing. A review of the facts presented at the December 7 evidentiary hearing clearly establish by convincing evidence that Mr. Rector was not competent to stand trial for capital murder and that the trial court's decision was erroneous.

Therefore, this Court should grant certiorari to evaluate whether the sixth amendment rights of Mr. Rector to assistance of counsel were denied in light of the clear evidence that Mr. Rector was not competent to communicate with his attorney at trial.

## CONCLUSION

This Court should grant certiorari to clarify its previous rulings in light of evidence of evolving standards of society concerning requisite mental capacity necessary for a prisoner to be put to death.

Furthermore, Mr. Rector has established by convincing evidence that the state court's ruling that he was competent to stand trial for capital murder was erroneous. Mr. Rector has shown that his sixth amendment rights to confront the witnesses against him and the right to assist in his own defense have been denied him. Therefore, this Court should grant certiorari to evaluate the evidence which was not available at the trial level to determine whether the sixth amendment rights of the Petitioner were denied.

Respectfully submitted,
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| 28 U.S.C. § 2254 | D | D-1 to D-3 |
| S. 618, 102d Cong. 1st Sess. § 3596 (1991) | E | E-1 to E-4 |
| S. 1970, 101st Cong. 2nd Sess. 136 Cong. Rec. S 10184, S 10189 (daily edition July 20, 1990) | F | F-1 to F-2 |

APPENDIX A



profit. The injury is analogous to the cost of moving expenses incurred as a result of promised employment in *Eby* and *Pepsi-Cola*.

Nor were these promises merely meaningless restatements of an understood at-will relationship. With its current business opportunity, General stood at a crossroads. Circumstances foreshadowed a costly demise for the company, but it was able to negotiate an alternative. Far from confirming the obvious, Bacardi wrote its assurances on a clean slate with full knowledge that General was just as likely to reject the offered relationship as embrace it. That this was the situation is indicated most clearly by Bacardi's repeated calls to check on Stout's impending decision. Bacardi reassured Stout of its commitment in full knowledge that he planned to reject National's offer and with the reasonable expectation that an immediate pull out would severely undermine General's asking price. Like the plaintiffs in *Eby* who moved based on the promise of a job, General incurred a cost in rejecting the deal that was non-recoverable once Bacardi's later decision became known.

There may always exist the potential for a quandry in a promissory estoppel action based on a promise of at-will employment. When could Bacardi terminate the relationship with General without fear of liability for reliance costs, once it made the assurances in question? Obviously we do not hold that General and Bacardi had formed a new, permanent employment relationship. How long an employee can rely on the employer's promise is not a matter we can decide here. The issue is one of reasonable reliance, and to the extent that there might be questions, they should be for trial.

III.

We have, of course, reviewed this case in the posture of summary judgment. General's allegations still must be proven at trial. However, under Indiana law, we think that Bacardi's promise was of a sort on which General might rely, with the possibility of damages for breach. For that reason the judgment of the district court is

REVERSED AND REMANDED.

KEY NUMBER SYSTEM

**Ricky Ray RECTOR, Appellant,**

**v.**

**Steve CLARK, Attorney General, State of Arkansas; and, A.L. Lockhart, Director of Arkansas Department of Correction, Appellees.**

**No. 90-1204.**

United States Court of Appeals, Eighth Circuit.

Submitted Oct. 12, 1990.

Decided Jan. 2, 1991.

Rehearing and Rehearing En Banc Denied Feb. 13, 1991.

Petitioner sought habeas corpus relief from death sentence imposed in capital murder prosecution. The United States District Court for the Eastern District of Arkansas, 727 F.Supp. 1285, Henry Woods, J., denied relief. Petitioner appealed. The Court of Appeals, Ross, Senior Circuit Judge, held that: (1) ability to inform counsel or court of any fact which might make punishment unjust or unlawful was not prerequisite to determination that petitioner was competent to be executed; (2) petitioner was competent to be executed; and (3) state court determination that petitioner was competent to stand trial, notwithstanding frontal lobotomy, had to be presumed to be correct, in the absence of basis to question the state court determination.

Affirmed.

1. **Criminal Law** ⇐1213.8(8)

Execution of incompetent criminal constitutes cruel and unusual punishment un-

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der the Eighth Amendment. U.S.C.A. Const.Amend. 8.

2. Criminal Law ⇐981(1)

Two factors must be examined in assessing defendant's competency to be executed: whether defendant understands that he is to be punished by execution and whether defendant understands why he is to be punished; the ability to inform counsel or court of any fact which would make punishment unjust or unlawful is not condition precedent to determination that defendant is competent to be executed. U.S.C.A. Const.Amend. 8.

3. Criminal Law ⇐981(1)

Defendant, who had frontal lobotomy, was competent to be executed; examining physicians stated that defendant had no mental illness or defect which would prevent defendant from being aware of the impending execution or the reason for it. U.S.C.A. Const.Amend. 8.

4. Habeas Corpus ⇐771

State court determination that capital murder defendant, who had frontal lobotomy, was competent to stand trial had to be presumed correct, in the absence of basis to question the state court determination.

5. Criminal Law ⇐625.25

Determination in 1989 that defendant did not possess the ability to inform counsel or the court of any fact which would make punishment unjust or unlawful could not be used to prove or disprove defendant's competency in 1982 to stand trial for capital murder.

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John Mason Jewell, Little Rock, Ark., for appellant.

Jack Gillean, Little Rock, Ark., for appellee.

Before BOWMAN and WOLLMAN, Circuit Judges and ROSS, Senior Circuit Judge.

ROSS, Senior Circuit Judge.

Petitioner, Ricky Ray Rector, appeals the district court's[1] denial of habeas corpus relief. We affirm.

FACTS

On March 22, 1981, Ricky Ray Rector shot and killed Arthur Criswell and wounded two others at a Conway, Arkansas restaurant. On March 24, 1981, Officer Bob Martin of the Conway Police Department went to the home of petitioner's mother in search of petitioner, as he was the prime suspect in the murder. While the officer was talking with Mrs. Rector, petitioner entered the back of the house, proceeded into the living room, and fatally shot Officer Martin. Moments later petitioner unsuccessfully attempted suicide by shooting himself in the forehead.[2] He was taken to a hospital where his gunshot wound was cleaned and surgically closed.

A jury found petitioner guilty of first degree murder in the Criswell shooting. Prior to the trial, the judge found petitioner competent to stand trial. The Supreme Court of Arkansas affirmed the conviction, *Rector v. State*, 277 Ark. 17, 638 S.W.2d 672 (1982), and petitioner was sentenced to a life term in prison. Next, petitioner was tried for the capital murder of Officer Martin. Prior to this second trial, petitioner was again found to be competent to stand trial. A jury found petitioner guilty of the capital murder of Officer Martin and petitioner was sentenced to death on November 11, 1982. This conviction was affirmed by the Arkansas Supreme Court and the United States Supreme Court denied certiorari. *Rector v. State*, 280 Ark. 385, 659 S.W.2d 168 (1983), *cert. denied*, 466 U.S. 988, 104 S.Ct. 2370, 80 L.Ed.2d 842 (1984).

Petitioner filed a petition for writ of habeas corpus, which was twice amended. Two issues were addressed in the habeas proceeding: (1) whether petitioner's present mental ability should prevent his execution; and (2) whether petitioner's

1. The Honorable Henry Woods, United States District Judge for the Eastern District of Arkansas.

2. The trauma to petitioner's head resulted in the severance of about three inches of the left frontal pole. This is commonly referred to in medical terms as a frontal lobotomy.





mental ability at his capital murder trial was so diminished that he was unable to receive the requisite assistance of counsel so as to satisfy the sixth amendment. The district court denied habeas relief and petitioner appealed. *See Rector v. Lockhart*, 727 F.Supp. 1285 (E.D.Ark.1990). We now affirm.

DISCUSSION

[1] The execution of an incompetent criminal constitutes cruel and unusual punishment under the eighth amendment. *Ford v. Wainwright*, 477 U.S. 399, 417, 106 S.Ct. 2595, 2605, 91 L.Ed.2d 335 (1986). In addition, Arkansas has enacted a statute making it illegal to execute the insane. *See* Ark.Code Ann. § 16-90-506(d) (1987). Our task is to determine whether the execution of Ricky Ray Rector would be violative of the eighth amendment. We are guided by the Supreme Court's decision in *Ford, supra*, in our selection of an appropriate test by which to assess petitioner's competency.

[2, 3] The *Ford* majority found that the eighth amendment prevented the execution of "one whose mental illness prevents him from comprehending the reasons for the penalty or its implications." *Ford, supra*, 477 U.S. at 417, 106 S.Ct. at 2606. Similarly, in his concurring opinion, Justice Powell stated: "I would hold that the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it." *Id.* at 422, 106 S.Ct. at 2608. In the Missouri case of *Smith v. Armontrout*, 857 F.2d 1228, 1230 (8th Cir. 1988), this court cited to *Ford:* "Under [*Ford*], it would be a violation of the Eighth Amendment to execute someone who lacks capacity to understand the nature and purpose of the punishment about to be imposed on him." Therefore, according to *Ford*, we must examine two factors in assessing petitioner's competency to be executed: (1) whether petitioner understands that he is to be punished by execution; and (2) whether petitioner understands why he is being punished. An examination of the record leads us to believe that petitioner is competent to be executed under these standards.

After petitioner raised this competency-to-be-executed issue, the district court ordered the petitioner to undergo a competency evaluation at the United States Medical Center for Federal Prisoners (MCFP) in Springfield, Missouri. In the final forensic report of August 1989, the examining MCFP doctors stated:

> In the opinions of the undersigned examiners, Mr. Rector satisfies the competency standard contained in *Ford v. Wainwright*. That is, it appears that no mental illness or defect prevents Mr. Rector from being aware of his impending execution and the reason for it.

(Petitioner's exhibit 1, p. 5).

Petitioner, however, argues that the *Ford* test is an incomplete competency test and urges this court to adopt the test set forth in § 7-5.6 of the American Bar Association Criminal Justice Mental Health Standards (ABA standards). The ABA standards incorporate the *Ford* test described above, but add a second dimension. This added dimension involves a determination of whether the convict possesses the ability to inform counsel or the court of any fact which might exist which would make the punishment unjust or unlawful. The doctors who examined petitioner at the MCFP found that although petitioner was competent under the *Ford* test, he was incompetent under the ABA standards:

> In the opinions of the undersigned examiners, Mr. Rector would have considerable difficulty due to his organic deficits in being able to work in a collaborative, cooperative effort with an attorney. In our opinions it appears that he would not be able to recognize or understand facts which might be related to his case which might make his punishment unjust or unlawful.

(Petitioner's exhibit 1, p. 5-6).

Apparently this difference in opinion under the ABA standards is due to the added ability-to-assist-counsel requirement, which is not required under the *Ford* test.

We agree with the district court that, "[w]hile the [ABA standards] are interesting, they have no legal effect." *Rector, supra*, 727 F.Supp. at 1292. We hold that

the district court was correct in rejecting the ABA standards and in selecting the *Ford* test as the appropriate measure of petitioner's competency. Furthermore, after reviewing the record, we find that the district court's application of the *Ford* test to the present facts was not erroneous. Therefore, we affirm the district court's finding that petitioner is competent to be executed.

[4] Petitioner also urges this court to reverse the finding of the district court that petitioner was competent to stand trial in 1982 for the capital murder of Officer Martin. Petitioner does not dispute his competency at the time he actually shot Officer Martin, but rather claims that the self-inflicted gunshot wound and resulting head injury caused him to become incompetent at the time of the capital murder trial in 1982. Petitioner raised this competency issue before the state trial court at a competency hearing at which two psychologists testified on behalf of petitioner, while two psychologists and two psychiatrists from the State Hospital testified for the State. The testimony was in conflict as to whether petitioner was competent to stand trial.

The trial court found petitioner competent to stand trial and, on appeal, the Arkansas Supreme Court affirmed, *Rector v. State*, *supra*. The district court reviewed these state court findings as well as new testimony presented by petitioner. At the federal habeas hearing, petitioner called three lay witnesses, two of his prior attorneys and his sister, to testify as to his competency. The attorneys' testimony focused on petitioner's "passivity and unemotional affect along with his amnesia." 727 F.Supp. at 1291. Petitioner's sister testified that petitioner had undergone a personality change following the self-inflicted gunshot wound. It should be noted that none of the above three witnesses have received any formal training in psychology or psychiatry. We agree with the district court that: "When the testimony of these three witnesses is juxtaposed against the testimony of the four highly qualified experts who testified at prior to [sic] Rector's 1982 state trial, [we] are not impressed." *Id.*

We also recognize that petitioner's competency to stand trial is a factual issue for the state court to decide. Finding no basis to question the state court's findings, those findings are presumed to be correct. *See Wright v. Minnesota*, 833 F.2d 746, 748–49 (8th Cir.1987), *cert. denied*, 485 U.S. 1011, 108 S.Ct. 1481, 99 L.Ed.2d 709 (1988); *Beans v. Black*, 757 F.2d 933, 935 (8th Cir.), *cert. denied*, 474 U.S. 979, 106 S.Ct. 381, 88 L.Ed.2d 334 (1985); 28 U.S.C. § 2254(d).

[5] Finally, petitioner claims that the final report of the MCFP supports his contention that he was not competent to stand trial. Petitioner seems to argue that because he failed to meet the ability-to-assist-counsel requirement of the ABA standards when evaluated at the MCFP in 1989 for his competency to be executed, that somehow this evaluation ought to reflect on petitioner's competency to stand trial for the capital murder in 1982. The district court properly rejected this argument. The doctors completing the 1989 MCFP report testified that they were not making any kind of comment or suggestion regarding petitioner's competency to stand trial when he was tried for capital murder in 1982. Clearly, this testimony cannot be used to prove or disprove petitioner's competency back in 1982.

## CONCLUSION

For the foregoing reasons, we affirm.



APPENDIX B

judge in *Cleveland*. It points to the CAP complaint on July 1, 1988, that "the subject at 1328 South 85th Street has involvement with handguns," as testified to by Sergeant Porter. Unfortunately for the government, this is not the sort of particularized circumstances that justifies an unannounced, forced entry into the home of a citizen.

In *Cleveland*, the court did note,

> [t]he state argues that because drug dealers are often armed, the officers reasonably believed that their safety would be endangered if they announced their presence. The fact that a person is a member of a class of persons more likely to resist search is not sufficient to justify unannounced entry. *The officer must have knowledge of specific facts that indicate that this particular person will conduct himself or herself in this manner when confronted by police.*

118 Wis.2d at 631 n. 16, 348 N.W.2d 512 (emphasis added).

In this case, the only information that the officers had about weapons was information of an exceedingly general nature given by an anonymous telephone tipster six months prior to the execution of the warrant. This stale and general information is of little value. The only recent information that the officers had was that which stemmed from two "garbage" searches and a "controlled buy" a few days before the warrant was applied for. There was *nothing* in the garbage which would in any way have suggested the presence of firearms in the home to be searched, much less that anyone in the home would use any weapons to resist the officers. Furthermore, there was nothing in the testimony presented by the officers to Judge Callan that in any way suggested weapons were involved in any way with the controlled buy.

I find that the forcible entry under the circumstances of this case was not justified. Mr. Singer's rights were violated (not to mention the rights of his wife and children) by the unconstitutional no-knock entry into and search of his home. The very facts presented in the reports concerning the application for and execution of the warrant demonstrate beyond doubt that there was insufficient basis for the no-knock warrant to be issued and, further, that no new information was obtained prior to the search itself to permit it to be executed in a no-knock fashion.

I also conclude that no "good faith" exception is present here that would save the search.

Lastly, I ADOPT the reasoning of Magistrate Bittner in his June 19, 1989, recommendation and find that the statements made by Mr. Singer during the search of his home are inadmissible in the government's case-in-chief.

Accordingly, the motions of Mr. Singer to suppress, consistent with this opinion, are GRANTED. Further proceedings in the case will be held on January 17, 1990, at 8:30 a.m.

SO ORDERED.

Ricky Ray RECTOR, Petitioner,

v.

A.L. "Art" LOCKHART, Director Arkansas Department of Corrections, and Steve Clark, Attorney General of the State of Arkansas, Respondents.

No. PB-C-84-287.

United States District Court,
E.D. Arkansas,
Pine Bluff Division.

Jan. 3, 1990.

After defendant's capital murder conviction was affirmed on appeal, 280 Ark. 385, 659 S.W.2d 168, defendant petitioned for writ of habeas corpus. The District Court, Henry Woods, J., held that: (1) evidence was sufficient to establish that defendant was competent to stand trial for





first-degree murder, and (2) evidence concerning defendant's mental condition was sufficient to establish that he had mental capacity to be executed.

Petition denied.

**1. Criminal Law ⇐625.15**

Evidence at state pretrial competency hearing concerning defendant's mental ability was sufficient to establish that defendant was competent to stand trial for first-degree murder, despite evidence that defendant had undergone personality change and suffered from amnesia as result of self-inflicted gunshot wound. U.S.C.A. Const.Amend. 6.

**2. Habeas Corpus ⇐718**

Evidence in habeas proceeding concerning mental condition of petitioner on death row was sufficient to establish that petitioner had mental capacity to be executed. U.S.C.A. Const.Amend. 8.

**3. Criminal Law ⇐1213.8(8)**

Under Eighth Amendment, state is prohibited from carrying out sentence of death upon prisoner who is insane. U.S.C.A. Const.Amend. 8.

**4. Habeas Corpus ⇐748**

When issue of mental capacity of prisoner sentenced to death is raised in habeas corpus petition, district court must hold plenary hearing if there has not been state procedure which accorded petitioner due process and gave him or her fair and a full opportunity to establish lack of competency. U.S.C.A. Const.Amends. 5, 8, 14.

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John M. Jewell, Little Rock, Ark., for petitioner.

Jack Gillean, Asst. Atty. Gen., Little Rock, Ark., for respondents.

ORDER

HENRY WOODS, District Judge.

On March 22, 1981 the petitioner, presently a death row inmate at the Arkansas penitentiary, shot and killed Arthur Criswell and wounded two others at a Conway, Arkansas restaurant. For two days the police searched for Ricky Ray Rector since he was known to be the assailant. A uniformed Conway police officer, Bob Martin, on March 24, 1981 went to the home of Rector's mother. As set forth by the Supreme Court of Arkansas, the following events then occurred:

> While the officer was talking to Rector's mother, sister, and nephew, Rector entered the back of the house and came into the living room. Rector and the officer knew each other and may have exchanged a few words of greeting. Within a few minutes Rector, who had not joined in the conversation, drew a pistol and shot Officer Martin twice. Rector left by the back door and said to his nephew's wife, whom he met crossing the yard: "I just shot that cop." A few moments later Rector attempted suicide by shooting himself in the forehead, the bullet entering the front part of his brain. That evening the wound was surgically cleaned and closed.

*Rector v. State*, 280 Ark. 385, 388, 659 S.W.2d 168 (1983).

Rector was first tried for the murder of Arthur Criswell. Prior to that trial, a hearing was held on September 28, 1981 in response to a motion by Rector's counsel suggesting that Rector was mentally incompetent. On evidence which the Arkansas supreme court characterized as being in "hopeless conflict," the trial judge found that Rector was competent to stand trial. The jury convicted him of first degree murder, and he was sentenced to life imprisonment. The Supreme Court of Arkansas affirmed the conviction. *Rector v. State*, 277 Ark. 17, 638 S.W.2d 672 (1972).

After this affirmance on September 18, 1982, Rector was tried for the capital murder of Officer Martin. Defense counsel again on October 7, 1982 moved for a second hearing to determine Rector's competency. Such a hearing was held on October 25, 1982. Two psychologists, Dr. Douglas Brown and Dr. Douglas A. Stevens, testified on behalf of Rector. Brown had also testified at the competency hearing on September 28, 1981 prior to the trial for the

murder of Criswell. Ron Heller, an attorney for Rector in the Criswell case, also testified in his behalf at both hearings. All three of these individuals testified in the habeas hearing before me, along with Dan Stripling, his attorney in the capital murder trial, and Rector's sister.

At the competency hearing on October 25, 1982, the State adduced testimony from two psychiatrists, Dr. Gregory Kaczewski and Dr. Sayel K. Hamed, and two psychologists, Dr. John Anthony Hall and Dr. Joe Alford. The testimony of all these witnesses is transcribed in Petitioner's Exhibit 9. The testimony is abstracted in Defendant's Exhibit 2. After hearing this testimony, the trial judge again found Rector competent to stand trial. The jury found him guilty, and he was sentenced to death on November 11, 1982.

The competency ruling was one of the issues raised on the appeal of Rector's death sentence to the Supreme Court of Arkansas. In affirming his capital murder conviction, Justice George Rose Smith wrote for a unanimous court:

> A second argument for reversal is that the trial judge should have found Rector incompetent to stand trial against the death penalty. A parallel question of competency was decided adversely to Rector on his earlier appeal from his conviction for the murder of Arthur Criswell. *Rector v. State*, 277 Ark. 17, 638 S.W.2d 672 (1982). The proof in the two cases is quite similar, although in this case a witness for the State, Dr. Hamed, thought that Rector's condition was much improved as compared to the time Dr. Hamed saw Rector soon after his surgery.
>
> The expert proof is in sharp conflict, as it was on the other appeal. It is argued, however, that it takes a higher degree of competency to defend against the death penalty; so the two appeals are distinguishable. No doubt the issues may be more extensive in a death case, in which aggravating and mitigating circumstances are involved, but we do not discern any basis in the testimony for relating Rector's mental condition to the defense of a capital charge in particular. We must conclude, as we did on the earlier appeal, that the trial judge's decision is not clearly erroneous.

*Rector v. State*, 280 Ark. 385, 397, 659 S.W.2d 168 (1983). The Supreme Court of the United States denied certiorari. *Rector v. Arkansas*, 466 U.S. 988, 104 S.Ct. 2370, 80 L.Ed.2d 842 (1984).

In his original habeas corpus petition, Rector raised a number of issues later abandoned. He then filed an amended petition in which the lone contention was an absence of the requisite mental capacity to be put to death by the State of Arkansas, *citing* ACA § 5-2-302:

> No person who, as a result of mental disease or defect, lacks capacity to understand the proceedings against him or to assist effectively in his own defense shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity endures.

Amended Petition for Writ of Habeas Corpus at 13. Rector also claims that his Eighth Amendment rights would be violated by his execution.

Since the habeas petition requested that he be given a mental examination, I sent him to the federal correction facility at Springfield, Missouri for a complete psychiatric evaluation. The reports concerning Rector's evaluation are contained in Petitioner's Exhibits 1-7, received by agreement.

A hearing on Mr. Rector's habeas petition was noticed on October 10, 1989 and scheduled for December 7, 1989. On December 4, 1989 without objection Rector was permitted to amend his habeas petition. In his amended petition Rector claims as an additional ground that he was not competent to stand trial for capital murder. He further asserts that his mental capacity at the trial was so diminished as to deny him the effective assistance of counsel as guaranteed by the Sixth Amendment.

There are thus only two contentions in this habeas proceeding: (1) Rector's present mental ability should prevent his execution; and (2) Rector's mental ability





at his capital murder in 1982 was so diminished that he was unable to receive the requisite assistance of counsel so as to satisfy the Sixth Amendment.

I will discuss these contentions in reverse order and initially take up the matter of whether the state court judge erred in holding that Rector was competent to stand trial in November of 1982 and able to render the requisite assistance to his counsel. Petitioner has thrust a heavy burden upon this court in asking that a determination be made of his mental condition seven years ago.

[1] It must be remembered that Rector does not now contend that he had mental problems at the time he shot Officer Martin, but that problems arose thereafter as a result of a self-inflicted gunshot wound.

Six expert witnesses testified in the competency hearing on October 25, 1982 before Circuit Judge George F. Hartje. Two psychiatrists and two psychologists testified for the State. Two psychologists testified for the defense. Dr. Douglas A. Brown for the defense testified that in his opinion "Ricky is not competent to assist meaningfully in his defense of his own life in a capital case." On cross-examination he testified as follows:

> Q. He still understands the nature, seriousness and consequences of his actions?
>
> A. Yes, I believe he does.
>
> Q. He understands the punishment?
>
> A. He understands it in an intellectual level, yes.

PX 9, pp. 115-16.

Dr. Stevens, the other psychologist who testified for the defense, was present during the testimony of Dr. Brown. He agreed with Dr. Brown that Rector was not able to assist in his defense because of diminished mental abillity. He testified that "I think the critical thing is that he has no seeming memory for the events associated with this trial, and the report that he gives me is bizarre." (PX 9, p. 125).

The testimony that Rector was not able to assist in his own defense was flatly contradicted by the State's experts. Dr. John Anthony Hall, a psychologist, testified as follows:

> A. I think he's capable of assisting in his defense. Again, he seems to be able to express himself quite openly. His defense seems to be fairly clearly stated to us that he doesn't remember anything. He was able to express that quite clearly. Oh, I believe that there is no emotional interference with his defense—with his assisting in his defense.

PX 9, p. 137.

Dr. Gregory Kaczewski, a psychiatrist, gave his opinion as follows:

> Q. ... Doctor, do you have an opinion about whether or not Mr. Rector is capable of assisting his counsel in his defense of the charges now pending against him that carry with it the potential death penalty?
>
> A. I believe that Mr. Rector is competent and is capable of assisting his defense attorney in his own defense. I did not see him as apathetic and unemotional as some of the other people have seen him.

PX 9, p. 151. Dr. Kaczewski was of the opinion that Rector was faking in some of the interviews and tests. (PX 9, pp. 156-57). He further testified as follows:

> Q. Do you feel that he understands the nature of the charges and the proceedings that he's involved in right now?
>
> A. Yes.
>
> Q. And the seriousness of it?
>
> A. Yes, sir.
>
> Q. And the consequences that could potentially flow from it?
>
> A. Yes, I do.

PX 9, pp. 161-62.

Dr. Joe Alford, a psychologist, testified as follows for the State:

> Q. Let me ask you, when you were doing that, did you have occasion to discuss with him the nature of the charges that are pending against him now?

A. Yes. That was part of the—the battery was a competency screening test where I asked him about, uh, different things about the nature of the proceeding, roles people take and things like that.

Q. Did he understand?

A. It was my opinion that he had a good understanding of the nature of the charges, the consequences of what could happen to him as a result of those charges, and that he had a good understanding of what people did, you know, in fairly general terms not in really specific terms, of what people do in court.

PX 9, p. 168.

Dr. Sayed Hamed, a psychiatrist, was the last expert witness for the State. He was the principal examining psychiatrist at the Arkansas State Hospital where Rector had been referred for evaluation. His opinion is summarized in the following answer on direct examination:

> My opinion is that Mr. Ricky Rector understands well the nature of the charges and the proceedings taken against him and is capable of cooperating with an attorney in a rational manner in the preparation of his defense....

PX 9, p. 181.

On the basis of this testimony, the trial judge found Rector competent to stand trial. I agree with the comments of the Supreme Court of Arkansas set out *supra*, with respect to the ruling of the trial judge. In my opinion the testimony at the October 25, 1982 competency hearing clearly preponderated in favor of the ruling of the trial judge. As the Supreme Court of Arkansas observed, the ruling of the trial judge was not "clearly erroneous." The ruling was made on a factual dispute after the trial judge heard conflicting testimony. It was affirmed by the Supreme Court of Arkansas and reviewed by the Supreme Court of the United States. The trial judge's factual finding on the competency issue falls clearly within the ambit of 28 U.S.C. § 2254(d) and is entitled to a presumption of correctness. *See Davis v. Wyrick*, 766 F.2d 1197, 1201 (8th Cir.1985). None of the exceptions noted in this subsection are applicable. Therefore, the burden rests upon the petitioner "to establish by convincing evidence that the factual determination by the state court was erroneous." This subsection was interpreted by the Supreme Court in *Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981):

> Section 2254(d) by its terms thus applies to factual determinations made by state courts, whether the court be a trial court or an appellate court.... Given the applicability of 2254(d), it is apparent that the Court of appeals did not apply the "presumption of correctness" which is mandated by the statute to the actual determination made by the California state courts.

*Id.* at 547, 101 S.Ct. at 769. Two years later the Supreme Court in *Marshall v. Lonberger*, 459 U.S. 422, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983) was again called upon to interpret 28 U.S.C. § 2254(d):

> In its treatment of the state courts' factual findings, the Court of Appeals failed in at least one major respect to accord those determinations the "high measure of deference," *Sumner v. Mata, supra*, to which they are entitled. This deference requires that a federal habeas court more than simply disgree with the state court before rejecting its factual determinations. Instead, it must conclude that the state court's findings lacked even "fair support" in the record. The Court of Appeals' treatment of the issue of respondent's credibility failed to satisfy this standard....
>
> ....
>
> ... Title 28 U.S.C. § 2254(d) gives federal habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them.

*Id.* at 432, 434, 103 S.Ct. at 849, 851.

Was any evidence introduced in the hearing before me on December 7, 1989 that would impair the finding of competency made by the state trial judge? The testimony of Drs. Stevens and Brown given before me was simply a reiteration of their





previous testimony at the competency hearing on October 25, 1982. Neither had seen the petitioner since that time. The only new material called to their attention consisted of the reports from the examiner at the Springfield facility and the deposition of Dr. David Reuterfors, the principal examining psychologist. At Springfield the examination team consisted of Dr. David Reuterfors, a psychologist, Dr. James R. Leach, a psychiatrist, and a nurse. The report to me as a result of my referral of the petitioner to Springfield was signed by Reuterfors and Leach and was sent to me by the Psychiatric Service Coordinator under date of August 23, 1989. At that time the only issue being raised was whether petitioner's mental capacity was such that he could be legally executed. No issue had been raised concerning his competency in the 1982 trial. This issue was first introduced on December 4, 1989, three days before the plenary habeas hearing in my court. The contents of this report will be discussed, *infra*. It did not deal with the issue now being addressed—Rector's competency at the trial. This was made plain in the deposition of Dr. Reuterfors taken on November 21, 1989, wherein he stated:

> So the focus of subsequent interviews became his present mental function, because that is really what is most relevant to our ultimate formulation anyway, as of what is his condition now and not five years ago or ten years ago and that that's what we centered on in the subsequent interviews and that's what the psychological testing was all about, his current mental functioning.

PX 11, p. 36. On cross-examination the psychologist further clarified his answer:

Q. ... The first thing that I do want to go to is this: The reference questions that you have presented by Judge Woods, the two standards that you were asked to evaluate Mr. Rector under, you compared the second test, the ABA test, as being somewhat analogous to competency to stand trial; that is, the defendant's ability to consult with his attorneys in preparing the defense. That was not the specific question, though, competency to stand trial, per se, was not the issue before you in this evaluation?

A. That's correct. That was just an analogy.

Q. So you're not making any kind of comment or making a suggestion about whether or not he was competent to stand trial when he was tried in 1982?

A. No, not at all.

PX 11, p. 106.

He further testified on redirect:

Q. You previously testified that you had evaluated maybe hundreds of individuals on the issue of competency to stand trial. Could you tell me what the standard was that you used in these evaluations?

A. In terms of competency to stand trial? Well, it's the basic competency standards. It's the question of whether, due to mental illness or defect, the individual understands the legal proceedings against him and is able to assist an attorney in preparing a rational defense. So it's a two-pronged standard, basically.

Q. Okay. In your opinion today would Rector be competent to stand trial?

A. I didn't evaluate Mr. Rector on that question and I don't feel it's appropriate for me to speculate in retrospect on that.

PX 11, pp. 133–34.

The other witnesses who testified before me were two former attorneys for Rector, Ron Heller and Dan Stripling, and his sister. Heller represented Rector in the first trial. His testimony was essentially the same as that given at the two competency hearings on September 28, 1981 and October 25, 1982. This testimony is abstracted in petitioner's appellate brief in the Arkansas supreme court at pages 48–51, which was introduced in evidence by agreement in the hearing before me. At the competency hearing directly involved herein (October 25, 1982), Heller did not testify in person, but it was stipulated that he would testify:

. . . [T]hat during that interview he particularly concerned himself with the capital aspects of the case, and particularly the issue of the presence of aggravating and mitigating circumstances and tried to develop those issues and the ones that were present in this case, and that he was unable to do so with Mr. Rector (T. 185).

That in his opinion, Mr. Rector does not understand the importance of these circumstances in his case, and does not have the ability to consider aggravating and mitigating circumstances.

RX 2A, p. 93.

Heller's testimony was considered by the state trial judge. I have also considered his testimony in the two competency hearings and in the hearing before me on December 7, 1989.

The other attorney, Dan Stripling, represented Rector in the capital murder trial under scrutiny in this proceeding. His testimony, like that of Heller, was directed toward Rector's mental condition at the time of the trial. Neither Heller nor Stripling has seen Rector since representing him. He has had other attorneys in the habeas proceedings.

The principal basis for the opinions of Heller and Stripling that Rector was not competent to stand trial was his passivity and unemotional affect along with his amnesia. "However, lack of memory is an inadequate ground for holding a defendant incompetent." *Deason v. State*, 263 Ark. 56, 562 S.W.2d 79, 81 (1978), *citing United States v. Stevens*, 461 F.2d 317 (7th Cir. 1972). "We agree with the Second Circuit that amnesia is not a bar to prosecution of an otherwise competent defendant." *Id.* at 320. *See also Davis v. Wyrick*, *supra* at 1202. The testimony of Rector's sister was that since his self-inflicted gunshot wound he had undergone a personality change and was now a different person. When the testimony of these three witnesses is juxtaposed against the testimony of the four highly qualified experts who testified at prior to Rector's 1982 state trial, I am not impressed.

The additional testimony and exhibits received at the the December 7, 1989 hearing before me have failed to establish that Rector was not competent to stand trial in the fall of 1982. Petitioner has fallen far short of meeting the standard required by 28 U.S.C. § 2254(d).

It is worthy of note that the jury found none of the following mitigating factors submitted for their consideration to be present:

1. The capital murder was committed while Ricky Rector was under extreme mental or emotional disturbance.
2. The capital murder was committed while Ricky Rector was acting under unusual pressures or influence or under the domination of another person.
3. Ricky Rector has undergone a significant personality change as a result of his self-inflicted gunshot wound.
4. Ricky Rector suffers from mental retardation.
5. Ricky Rector suffers from significant brain damage.

*Rector v. State*, No. CR83-39, Abstract and Appellant's Brief, Vol. 1, pp 13-14. (RX 2).

In summary, Rector has been found competent to stand trial by the trial judge, the jury, the Supreme Court of Arkansas (whose decision was reviewed *certiorari* by the Supreme Court of the United States). On the basis of the transcript of the October 25, 1982, the competency hearing transcript, the trial transcript, and the testimony and exhibits introduced before me in the hearing of December 7, 1989, I find independently that Ricky Ray Rector was competent to stand trial for the capital murder of Officer Bob Martin. In fact, I find that the evidence preponderates in favor of this conclusion.

[2] The remaining issue before me is whether Rector's present mental condition is such that he may be legally executed. On this issue the only testimony having significant probative value is that of Dr. Leach and Dr. Reuterfors, the psychiatrist and psychologist, respectively, at the





Springfield, Missouri federal correctional facility, where I sent Rector for evaluation. The other witnesses who testified at the hearing before me had not seen him for six or seven years. Their opinion on his present condition was based on the reports from Springfield and the deposition of Dr. Reuterfors. Only Rector's sister had seen him recently, and I do not accord her testimony substantial weight. Although the Springfield team made an evaluation under the standards promulgated by the Supreme Court in *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986) and also the American Bar Association, I am bound by the former standards. While the latter are interesting, they have no legal effect.

The evaluation by Drs. Leach and Reuterfors of the mental condition of Ricky Ray Rector in accordance with *Ford v. Wainwright, supra* was summarized as follows:

In each instance when Mr. Rector was interviewed, he had a basic, rational understanding of the reason why he was on death row. Mr. Rector understood that he had been convicted of a capitol [sic] offense. Mr. Rector also appeared to understand that the consequence of that conviction was that he was sentenced to die. Mr. Rector also stated on a number of occasions that he preferred to die rather than endure the conditions on death row in the Arkansas Penitentiary. In the opinions of the undersigned examiners, Mr. Rector satisfies the competency standard contained in *Ford v. Wainwright*. That is, it appears that no mental illness or defect prevents Mr. Rector from being aware of his impending execution and the reason for it.

Initial Forensic Report, p. 5, Ricky Rector, 8-8-89 (PX 1).

In his deposition Dr. Reuterfors stated:

Q. Now we're going to get into your discussion and your opinions, and we've been—we've probably been through most of what is in here by going through the report, but you've stated two opinions based on two standards in this section of your report. Could you—on the *Ford v. Wainwright* standard that you're setting out here, could you tell me what the standard was that you were applying there?

A. Well, as I understand it—and, again, this is for the Court ultimately to determine, but my understanding of that standard is whether or not the defendant, due to mental illness or defect, is unable to appreciate his situation and his impending execution and the reasons for his being sentenced to death. That's essentially my understanding of what that standard is.

Q. And under that standard, your opinion was?

A. In my opinion, Mr. Rector is able to meet that standard. He appreciates that he is on death row. He understands that he has been sentenced to death. He knows why the execution sentence was imposed. He understands what he was convicted of. So he has that basic rudimentary understanding of his situation. And according to that standard, I believe that he's competent.

PX 11, pp. 88-89.

In one respect the testimony from the psychologists on behalf of Mr. Rector in the hearing before me was somewhat damaging to him. They testified that based on the test and reports from Springfield and the deposition of Dr. Reuterfors, Rector's mental condition has improved since they saw him in 1982.

[3, 4] Based upon the testimony and exhibits introduced in the hearing before me on December 7, 1989, I find that Rector's mental condition is such that the State of Arkansas may legally proceed to execute him. "[T]he condemned prisoner does not enjoy the same presumption accorded a defendant who has yet to be convicted or sentenced." *Ford v. Wainwright, supra* at 411, 106 S.Ct. at 2602. But under the Eighth Amendment a state is prohibited from carrying out a sentence of death upon a prisoner who is insane. *Id.* at 410, 106 S.Ct. at 2602. When the issue is raised in a

habeas corpus petition, the U.S. District Court must hold a plenary hearing if there has not been a state procedure which accorded petitioner due process and gave him a fair and full opportunity to establish his lack of competency. Although this is a statutory procedure in Arkansas as noted, *supra*, it was not sought or applied in Rector's case. Therefore the matter was before me on a plenary *de novo* hearing to make the factual determination as to Rector's present competency. The test as laid down in *Ford v. Wainwright, supra*, is whether his "mental illness prevents him from comprehending the reasons for the penalty or its implication." *Id.* at 417, 106 S.Ct. at 2605. Justice Marshall's opinion in *Ford v. Wainwright, supra*, was a plurality opinion, and the concurrence of Justice Powell was necessary for the court's judgment. Justice Powell wrote in his concurring opinion:

> [P]etitioner does not make his claim of insanity against a neutral background. On the contrary, in order to have been convicted and sentenced, petitioner must have been judged competent to stand trial, or his competency must have been sufficiently clear as not to raise a serious question for the trial court. The State therefore may properly presume that petitioner remains sane at the time sentence is to be carried out, and may require a substantial threshold showing of insanity merely to trigger the hearing process.

*Id.* at 425–26, 106 S.Ct. at 2609–10.

Here no threshold showing of insanity was required, but petitioner was accorded a full and fair plenary hearing on the competency issue.

> Unlike issues of historical fact, the question of petitioner's sanity calls for a basically subjective judgment. (Citing cases). And unlike the determination of whether the death penalty is appropriate in a particular case, the competency determination depends substantially on expert analysis in a discipline fraught with "subtleties and nuances."

Powell, J. concurring at 426, 106 S.Ct. at 2610.

*Penry v. Lynaugh*, — U.S. —, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) does not aid the petitioner. The *Penry* case does not present the same issue as *Ford v. Wainwright, supra*. It was argued that Penry was so retarded mentally at the time the crime was committed that he did not have such culpability for the crime as would justify exaction of the death penalty. There is no contention that Rector was mentally impaired at the time he murdered the police officer. His alleged impairment resulted from a self-inflicted head wound a few minutes after the murder.

There is also wide disparity in the degree of impairment:

> As a child, Penry was diagnosed as having organic brain damage, which was probably caused by trauma to the brain at birth. Penry was tested over the years as having an IQ between 50 and 63, which indicates mild to moderate retardation. Dr. Brown's own testing before the trial indicated that Penry had an IQ of 54. Dr. Brown's evaluation also revealted that Penry, who was 22 years old at the time of the crime, had the mental age of a 6½ year old.

*Penry v. Lynaugh, supra*, — U.S. at —, 109 S.Ct. at 2941. Rector's IQ on the other hand was found to be 70 by the examining psychologist at Springfield. (Dep. of Dr. Reuterfors, p. 70). This places Rector right at the dividing line for mental retardation. As Justice O'Connor noted in footnote 1:

> Under the AAMR [American Association of Mental Retardation] classification system, individuals with IQ scores between 50–55 and 70 have "mild" retardation. Individuals with scores between 35–40 and 50–55 have "moderate" retardation. "Severely" retarded people have IQ scores between 20–25 and 35–40 and "profoundly" retarded people have scores below 20 or 25.

*Penry v. Lynaugh, supra*, — U.S. at —, 109 S.Ct. at 2941. While Penry was "mildly" or "moderately" retarded, according to the above classification system, there is a question whether Rector is retarded at all. As stated in the report of the





Springfield examiner: "The patient received a verbal intelligence quotient of 69, a performance intelligence quotient of 74, and full scale intelligence quotient of 70. This full scale intelligence quotient placed Mr. Rector right at the cut off for mental retardation." (PX 1, p. 3).

The Springfield evaluation is the only current assessment of Rector's mental condition. Except for petitioner's sister, none of the witnesses at the habeas hearing had seen him for seven years. Although *Penry* does not deal with the issue here presented, there is language in Justice O'Connor's separate opinion in Part IV(c) which hardly gives comfort to petitioner:

> In sum, mental retardation is a factor that may well lessen a defendant's culpability for a capital offense. But we cannot conclude today that the Eighth Amendment precludes the execution of any mentally retarded person of Penry's ability convicted of a capital offense simply by virtue of their mental retardation alone. So long as sentencers can consider and give effect to mitigating evidence of mental retardation in imposing sentence, an individualized determination of whether "death is the appropriate punishment" can be made in each particular case.

*Id.* at 34.

In Rector's case the sentencers considered and gave effect to mitigating evidence of mental retardation in imposing sentence. As Justice O'Connor noted: "A number of states explicity mention 'mental defect' in connection with such a mitigating circumstance." *Id.* at 31. This statement is footnoted to the statutes of ten states, including Ark.Code Ann. § 5–4–605(3). The statute was scrupulously followed in Rector's case by the instructions to the jury, as noted *supra*. The reason for the remand in *Penry* was that the jury was given no opportunity to consider Penry's mental impairment as a mitigating circumstance. In the Rector case the jury was fully accorded this opportunity.

In summary, my findings of fact are as follows:

(1) There was abundant evidence in support of the trial judge's determination that Rector was competent to stand trial for the murder of Officer Bob Martin.

(2) On the basis of my own independent review of the evidence presented in the state court proceedings and at the habeas hearing before me, I find that Rector was competent to stand trial in November of 1982.

(3) I find that the petitioner is aware of the punishment, its implications, and the reasons he is about to suffer it.

(4) I further find that Rector has a basic, rational understanding of the reason why he has been sentenced to death and why he is presently on death row as a result of being convicted of a capital offense.

I have also arrived at the following legal conclusions:

(1) The result of the competency hearing in state court is entitled to the presumption of correctness under *Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981) and *Davis v. Wyrick*, 766 F.2d 1197 (8th Cir.1985).

(2) The petitioner's Sixth Amendment Rights were not violated in the state court proceedings. Petitioner was at all times represented by able and conscientious counsel and has been mentally able to assist them in his defense.

(3) The petitioner's present mental condition satisfies the standards of *Ford v. Wainwright, supra*, and his execution would not offend the Eighth Amendment.

WEST KEY NUMBER SYSTEM

APPENDIX C

# United States Court of Appeals

## FOR THE EIGHTH CIRCUIT

No. 90-1204EA

| | | |
|---|---|---|
| Ricky Ray Rector, | * | |
| | * | |
| Appellant, | * | |
| | * | |
| vs. | * | Appeal from the United States |
| | * | District Court for the |
| Steve Clark, Attorney | * | Eastern District of Arkansas |
| General, State of Arkansas; | * | |
| and, A.L. Lockhart, | * | |
| Director of Arkansas | * | |
| Department of Correction, | * | |
| | * | |
| Appellees. | * | |
| | * | |

Appellant's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petition for rehearing by the panel is also denied.

February 13, 1991

Order entered at the direction of the Court.

Robert D. St. Vrain

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX D



peared to have been fully considered and properly handled by state courts. Carter v Peppersack (1957, CA4 Md) 242 F2d 750.

Certificate of probable cause need not be sought or obtained within period of 30 days from denial of habeas corpus petition; 28 USCS § 2253 fixes no prescribed time within which certificate of probable cause must be sought or obtained, nor does it require issuance of certificate of probable cause as condition precedent to filing notice of appeal. Fitzsimmons v Yeager (1968, CA3 NJ) 391 F2d 849, cert den 393 US 868, 21 L Ed 2d 137, 89 S Ct 154.

Appeal from dismissal of petition for habeas corpus relief challenging validity of conviction for attempted murder would be dismissed where petitioner had neither requested nor obtained certificate of probable cause. Lee v Washington Parish (1973, CA5 La) 476 F2d 285.

**44. —Upon appointment of counsel**

Henceforth, in accordance with discretion vested in court, attorneys would not normally be appointed or hearing held in habeas corpus cases involving state prisoners until certificate of probable cause has been granted; when petition of inmate of state institution has been denied by district court and certificate of probable cause has also been denied, and inmate seeks review in this court, it will be treated as condition precedent to appellate hearing for judge or panel of judges of court to issue such certificate. Burgess v Warden, Maryland House of Correction (1960, CA4 Md) 284 F2d 486, cert den 365 US 837, 5 L Ed 2d 746, 81 S Ct 753.

**45. Order signed by United States Magistrate**

"Order" granting certificate of probable cause signed by United States magistrate is clearly ultra vires and void. Dye v Cowan (1972, CA6 Ky) 472 F2d 1206.

**IV. DISPOSITION OF ACTION**

**46. Remand**

Where in habeas corpus proceeding it was not established whether or not inductee who had claimed classification as conscientious objector objected to participation in any war under any circumstances because of compelling voice of his conscience, Court of Appeals in reviewing order of district court dismissing petition and writ would not order inductee discharged but would remand him to district court for ascertainment as to whether or not director of selective service had adopted the finding of hearing officer to effect that inductee did not have conscientious objections to war under any circumstances. United States ex rel. Reel v Badt (1944, CA2 NY) 141 F2d 845.

Absent a ruling by district judge on application for certificate of probable cause, case remanded to secure same in interest of petitioner's right to a first level decision. Stewart v Beto (1971, CA5 Tex) 454 F2d 268, cert den 406 US 925, 32 L Ed 2d 126, 92 S Ct 1796.

Where petitioners pro se habeas corpus petition, though rather incoherent, indicated he might be entitled to relief, justice requires cause be remanded to District Court with instructions to permit petitioner leave to amend petition with aid of appointed counsel. Fryer v MacDougall (1972, CA5 Ga) 462 F2d 1093.

**47. Withdrawal of appeal**

Mental patient who was conditionally released from custody may withdraw his appeal from denial of writ of habeas corpus, although court will not stay proceedings and retain jurisdiction notwithstanding contention that hospital retained power to return petitioner to maximum security without even minimal due process hearing. Jackson v Robinson (1973) 155 App DC 94, 476 F2d 539.

## § 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.





(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.
(June 25, 1948, c. 646, § 1, 62 Stat. 967; Nov. 2, 1966, P. L. 89-711, § 2, 80 Stat. 1105.)

## HISTORY; ANCILLARY LAWS AND DIRECTIVES

**Prior law and revision:**

This section is declaratory of existing law as affirmed by the Supreme Court. (See Ex parte Hawk (1944) 321 US 114, 88 L Ed 572, 64 S Ct 448.) This section was enacted as amended by the Senate with the following explanation:

"This amendment is proposed by the Judicial Conference of Senior Circuit Judges.

"It has three purposes. The first is to eliminate from the prohibition of the section applications in behalf of prisoners in custody under authority of a State officer but whose custody has not been directed by the judgment of a State court. If the section were applied to applications by persons detained solely under authority of a State officer it would unduly hamper Federal courts in the protection of Federal officers prosecuted for acts committed in the course of official duty.

"The second purpose is to eliminate, as a ground of Federal jurisdiction to review by habeas corpus judgments of State courts, the proposition that the State court has denied a prisoner a 'fair adjudication of the legality of his detention under the Constitution and laws of the United States.' The Judicial Conference believes that this would be an undesirable ground for Federal jurisdiction in addition to exhaustion of State remedies or lack of adequate remedy in the State courts because it would permit proceedings in the Federal court on this ground before the petitioner had exhausted his State remedies. This ground would, of course, always be open to a petitioner to assert in the Federal court after he had exhausted his State remedies or if he had no adquate State remedy.

"The third purpose is to substitute detailed and specific language for the phrase 'no adequate remedy available.' That phrase is not suffi-

APPENDIX E



102D CONGRESS
1ST SESSION

# S. 618

To control and reduce violent crime.

---

IN THE SENATE OF THE UNITED STATES

MARCH 12 (legislative day, FEBRUARY 6), 1991

Mr. BIDEN (for himself and Mr. DECONCINI) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

# A BILL

To control and reduce violent crime.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. SHORT TITLE.**

This Act may be cited as the "Violent Crime Control Act of 1991".

**SEC. 2. TABLE OF CONTENTS.**

The table of contents for this Act is as follows:

Sec. 1. Short title.
Sec. 2. Table of contents.

TITLE I—SAFER STREETS AND NEIGHBORHOODS

Sec. 101. Short title.
Sec. 102. Grants to State and local agencies.

TITLE II—DEATH PENALTY

Sec. 201. Short title.

Sec. 202. Constitutional procedures for the imposition of the sentence of death.
Sec. 203. Specific offenses for which death penalty is authorized.
Sec. 204. Applicability to uniform code of military justice.
Sec. 205. Death penalty for murder by a Federal prisoner.
Sec. 206. Death penalty for civil rights murders.
Sec. 207. Racial Justice Act of 1991.

TITLE III—DEATH PENALTY FOR MURDER OF LAW ENFORCEMENT OFFICER ACT

Sec. 301. Death penalty for the murder of Federal law enforcement officials.
Sec. 302. Death penalty for the murder of State officials assisting Federal law enforcement officials.

TITLE IV—DEATH PENALTY FOR DRUG CRIMINALS ACT

Sec. 401. Short title.
Sec. 402. Death penalty for certain drug criminals.
Sec. 403. Drug distribution conspiracies.
Sec. 404. Drug import and export conspiracies.
Sec. 405. Drug distribution to minors or by employing minors.
Sec. 406. Export and import of major drug quantities.
Sec. 407. Distribution of major drug quantities.

TITLE V—PREVENTION AND PUNISHMENT OF TERRORIST ACTS

Sec. 501. Short title.

Subtitle A—Punishing Domestic and International Terrorist Acts

PART I—TERRORIST DEATH PENALTY ACT OF 1991

Sec. 511. Short title.
Sec. 512. Terrorist death penalty offense: terrorist acts abroad.

PART II—TERRORIST ACTS COMMITTED IN THE UNITED STATES

Sec. 521. Criminal offense for domestic terrorist acts.

PART III—INCREASING PENALTIES FOR INTERNATIONAL TERRORIST ACTS

Sec. 531. Penalties for international terrorist acts.
Sec. 532. Clerical amendments.

Subtitle B—Preventing Domestic and International Terrorist Acts

PART I—ATTACKING THE INFRASTRUCTURE OF TERRORIST ORGANIZATIONS

Sec. 541. Providing material support to terrorists.
Sec. 542. Forfeiture of assets used to support terrorists.

PART II—ELECTRONIC COMMUNICATIONS

Sec. 545. Cooperation of telecommunications providers with law enforcement.

PART III—COOPERATION OF WITNESSES IN TERRORIST INVESTIGATIONS

Sec. 551. Short title.
Sec. 552. Alien witness cooperation.
Sec. 553. Conforming amendment.





"(3) The court of appeals shall state in writing the reasons for its disposition of an appeal of a sentence of death under this section.

**"§ 3596. Implementation of a sentence of death**

"(a) IN GENERAL.—A person who has been sentenced to death pursuant to the provisions of this chapter shall be committed to the custody of the Attorney General until exhaustion of the procedures for appeal of the judgment of conviction and for review of the sentence. When the sentence is to be implemented, the Attorney General shall release the person sentenced to death to the custody of a United States marshal, who shall supervise implementation of the sentence in the manner prescribed by the law of the State in which the sentence is imposed. If the law of such State does not provide for implementation of a sentence of death, the court shall designate another State, the law of which does provide for the implementation of a sentence of death, and the sentence shall be implemented in the latter State in the manner prescribed by such law.

"(b) PREGNANT WOMAN.—A sentence of death shall not be carried out upon a woman while she is pregnant.

"(c) MENTAL CAPACITY.—A sentence of death shall not be carried out upon a person who is mentally retarded. A sentence of death shall not be carried out upon a person who, as a result of mental disability—

"(1) cannot understand the nature of the pending proceedings, what such person was tried for, the reason for the punishment, or the nature of the punishment; or

"(2) lacks the capacity to recognize or understand facts which would make the punishment unjust or unlawful, or lacks the ability to convey such information to counsel or to the court.

**"§ 3597. Use of State facilities**

"(a) IN GENERAL.—A United States marshal charged with supervising the implementation of a sentence of death may use appropriate State or local facilities for the purpose, may use the services of an appropriate State or local official or of a person such an official employs for the purpose, and shall pay the costs thereof in an amount approved by the Attorney General.

"(b) EXCUSE OF AN EMPLOYEE ON MORAL OR RELIGIOUS GROUNDS.—No employee of any State department of corrections or the Federal Bureau of Prisons and no employee providing services to that department or bureau under contract shall be required, as a condition of that employment, or contractual obligation to be in attendance at or to participate in any execution carried out under this section if such participation is contrary to the moral or religious convictions of the employee. For purposes of this



APPENDIX F

The PRESIDING OFFICER. Without objection, it is so ordered.

## OMNIBUS CRIME BILL

(Note: The following is the text of S. 1970, the omnibus crime bill, as passed by the Senate on July 11, 1990:)

S. 1970

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

SECTION 1. TABLE OF CONTENTS.


TITLE I—DEATH PENALTY

Sec. 101. Short title.
Sec. 102. Constitutional procedures for the imposition of the sentence of death.
Sec. 103. Conforming changes in title 18.
Sec. 104. Conforming amendment to Federal Aviation Act of 1954.
Sec. 105. Applicability to Uniform Code of Military Justice.
Sec. 106. Murder by a Federal prisoner.

TITLE II—HABEAS CORPUS REFORM

Sec. 201. Special habeas corpus procedures in capital cases.

TITLE III—USE OF FIREARMS IN CRIMES OF VIOLENCE AND DRUG TRAFFICKING CRIMES

Sec. 301. Increased mandatory minimum sentences without release for criminals using firearms and other violent criminals.
Sec. 302. Penalties for improper transfer, stealing firearm, or smuggling a firearm in drug-related offense.
Sec. 303. Revocation of supervised release.
Sec. 304. Longer prison sentences for those who sell illegal drugs to minors or for use of minors in drug trafficking activities.
Sec. 305. Life imprisonment without release for criminals convicted a third time.

TITLE IV—ASSAULT WEAPONS

Sec. 401. Short title.
Sec. 402. Unlawful acts.
Sec. 403. Definitions.
Sec. 404. Secretary to recommend designation as assault weapon.
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Subtitle A—Maintaining Funding for State and Local Law Enforcement Agencies

Sec. 1501. Maintaining funding for State and local law enforcement agencies.

Subtitle B—National Crime Information Center Project 2000

Sec. 1511. Short title.
Sec. 1512. Findings.
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TITLE XVI—FEDERAL LAW ENFORCEMENT AND JUDICIAL ASSISTANCE

Sec. 1601. Additional authorizations.

TITLE XVII—RURAL DRUG ENFORCEMENT

Sec. 1701. Short title.
Sec. 1702. Leadership on rural drug policy.






upon appeal by the defendant. Notice of appeal must be filed within the time specified for the filing of a notice of appeal. An appeal under this section may be consolidated with an appeal of the judgment of conviction and shall have priority over all other cases.

"(b) REVIEW.—The court of appeals shall review the entire record in the case, including—

"(1) the evidence submitted during the trial;

"(2) the information submitted during the sentencing hearing;

"(3) the procedures employed in the sentencing hearing; and

"(4) the special findings returned under section 3593(d).

"(c) DECISION AND DISPOSITION.—

"(1) If the court of appeals determines that—

"(A) the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor; and

"(B) the information supports the special finding of the existence of an aggravating factor required to be considered under section 3592;

it shall affirm the sentence.

"(2) In any other case, the court of appeals shall remand the case for reconsideration under section 3593.

"(3) The court of appeals shall state in writing the reasons for its disposition of an appeal of a sentence of death under this section.

"§ 3596. Implementation of a sentence of death

"(a) A person who has been sentenced to death pursuant to the provisions of this chapter shall be committed to the custody of the Attorney General until exhaustion of the procedures for appeal of the judgment of conviction and for review of the sentence. When the sentence is to be implemented, the Attorney General shall release the person sentenced to death to the custody of a United States marshal, who shall supervise implementation of the sentence in the manner prescribed by the law of the State in which the sentence is imposed. If the law of such State does not provide for implementation of a sentence of death, the court shall designate another State, the law of which does so provide, and the sentence shall be implemented in the latter State in the manner prescribed by such law.

"(b) A sentence of death shall not be carried out upon a woman while she is pregnant.

"(c) A sentence of death shall not be carried out upon a person who is mentally retarded. A sentence of death shall not be carried out upon a person who, as a result of mental disability—

"(1) cannot understand the nature of the pending proceedings, what such person was tried for, the reason for the punishment, or the nature of the punishment; or

"(2) lacks the capacity to recognize or understand facts which would make the punishment unjust or unlawful, or lacks the ability to convey such information to counsel or to the court.

"§ 3597. Use of State facilities

"(a) IN GENERAL.—A United States marshal charged with supervising the implementation of a sentence of death may use appropriate State or local facilities for the purpose, may use the services of an appropriate State or local official or of a person such an official employs for the purpose, and shall pay the costs thereof in an amount approved by the Attorney General.

"(b) EXCUSE OF AN EMPLOYEE ON MORAL OR RELIGIOUS GROUNDS.—No employee of any State department of corrections or the Federal Bureau of Prisons and no employee providing services to that department or bureau under contract shall be required, as a condition of that employment, or contractual obligation to be in attendance at or to participate in any execution carried out under this section if such participation is contrary to the moral or religious convictions of the employee. For purposes of this subsection, the term 'participation in executions' includes personal preparation of the condemned individual and the apparatus used for execution and supervision of the activities of other personnel in carrying out such activities.

"§ 3598. Application of chapter in Indian Country

"Notwithstanding sections 1152 and 1153, a death sentence of murder in the first degree committed by or against an Indian in Indian country (as that term is defined in section 1151) may be imposed under this chapter only if there was in effect at the time of the offense an election, by the governing body of the Indian tribe having jurisdiction over the place where the offense was committed, to have this chapter apply in such cases.".

(b) REPEAL.—Sections 3566 and 3567 of title 18, United States Code, are hereby repealed.

(c) AMENDMENTS TO CHAPTER ANALYSIS.—(1) The chapter analysis of part II of title 18, United States Code, is amended by adding the following new item after the item relating to chapter 227:

"228. Death sentence ..... 3591".

(2) The section analysis of chapter 227 of title 18, United States Code, is amended by amending the items relating to sections 3566 and 3567 to read as follows:

"3566. Repealed.
"3567. Repealed.".

SEC. 103. CONFORMING CHANGES IN TITLE 18.

(a) AIRCRAFTS AND MOTOR VEHICLES.—Section 34 of title 18, United States Code, is amended by striking the comma after "imprisonment for life" and inserting a period and striking the remainder of the section.

(b) ESPIONAGE.—Section 794(a) of title 18, United States Code, is amended by striking the period at the end of the section and inserting ", except that the sentence of death shall not be imposed unless the jury or, if there is no jury, the court, further finds that the offense directly concerned nuclear weaponry, military spacecraft or satellites, early warning systems, or other means of defense or retaliation against large-scale attack; war plans; communications intelligence or cryptographic information; or any other major weapons system or major element of defense strategy.".

(c) EXPLOSIVE MATERIALS.—(1) Section 844(d) of title 18, United States Code, is amended by striking "as provided in section 34 of this title".

(2) Section 844(f) of title 18, United States Code, is amended by striking "as provided in section 34 of this title".

(3) Section 844(i) of title 18, United States Code, is amended by striking the words "as provided in section 34 of this title".

(d) MURDER.—(1) The second undesignated paragraph of section 1111(b) of title 18, United States Code, is amended to read as follows:

"Whoever is guilty of murder in the first degree shall be punished by death or by imprisonment for life;".

(2) Section 1116(a) of title 18, United States Code, is amended by striking "any such person who is found guilty of murder in the first degree shall be sentenced to imprisonment for life, and".

(e) KIDNAPPING.—Section 1201(a) of title 18, United States Code, is amended by inserting after "or for life" the following: "and, if the death of any person results, shall be punished by death or life imprisonment".

(f) NONMAILABLE INJURIOUS ARTICLES.—The last paragraph of section 1716 of title 18, United States Code, is amended by striking the comma after "imprisonment for life" and inserting a period and striking the remainder of the paragraph.

(g) PRESIDENTIAL ASSASSINATIONS.—Subsection (c) of section 1751 of title 18, United States Code, is amended to read as follows:

"(c) Whoever attempts to kill or kidnap any individual designated in subsection (a) of this section shall be punished (1) by imprisonment for any term of years or for life, or (2) by death or imprisonment for any term of years or for life, if the conduct constitutes an attempt to kill the President of the United States and results in bodily injury to the President or otherwise comes dangerously close to causing the death of the President.".

(h) WRECKING TRAINS.—The second to the last undesignated paragraph of section 1992 of title 18, United States Code, is amended by striking the comma after "imprisonment for life" and inserting a period and striking the remainder of the section.

(i) BANK ROBBERY.—Section 2113(e) of title 18, United States Code, is amended by striking "or punished by death if the verdict of the jury shall so direct" and inserting "or if death results shall be punished by death or life imprisonment".

(j) HOSTAGE TAKING.—Section 1203(a) of title 18, United States Code, is amended by inserting after "or for life" the following: "and, if the death of any person results, shall be punished by death or life imprisonment".

(k) RACKETEERING.—(1) Section 1958 of title 18, United States Code, is amended by striking "and if death results, shall be subject to imprisonment for any term of years or for life, or shall be fined not more than $50,000, or both" and inserting "and if death results, shall be punished by death or life imprisonment, or shall be fined not more than $250,000, or both".

(2) Section 1959(a)(1) of title 18, United States Code, is amended to read as follows:

"(1) for murder, by death or life imprisonment, or a fine of not more than $250,000, or both; and for kidnapping, by imprisonment for any term of years or for life, or a fine of not more than $250,000, or both;".

(l) GENOCIDE.—Section 1091(b)(1) of title 18, United States Code, is amended by striking "a fine of not more than $1,000,000 or imprisonment for life," and inserting ", where death results, a fine of not more than $1,000,000, or imprisonment for life or a sentence of death,".

SEC. 104. CONFORMING AMENDMENT TO FEDERAL AVIATION ACT OF 1954.

Section 903 of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1473), is amended by striking subsection (c).

SEC. 105. APPLICABILITY TO UNIFORM CODE OF MILITARY JUSTICE.

The provisions of chapter 228 of title 18, United States Code, as added by this Act, shall not apply to prosecutions under the Uniform Code of Military Justice (10 U.S.C. 801).

SEC. 106. MURDER BY A FEDERAL PRISONER.

(a) IN GENERAL.—Chapter 51 of title 18, United States Code, is amended by adding at the end thereof the following:

"§ 1118. Murder by a Federal prisoner

"(a) Whoever, while confined in a Federal correctional institution under a sentence for